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March 9, 2006

Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Ex Parte Communication

Re: CC Docket No. 05-68

Dear Ms. Dortch:

The American Public Communications Council ("APCC") hereby responds to the ex parte letter submitted in this proceeding by Russell Blau and Tamar Finn of Swidler Berlin, on behalf of IDT Corporation and IDT Telecom, Inc. ("IDT"), on January 6, 2006 ("IDT 1/6 Ex Parte"), and the handout submitted by the same parties on January 18, 2006 ("IDT 1/18 Ex Parte").

APCC takes issue with IDT's position on the regulatory classification of "hybrid" information services. The "hybrid" issue concerns prepaid calling cards that are used for both "phone calls [between end users]¹ and access to stored information." IDT 1/18 Ex Parte at 8. IDT states that "FCC precedent classifies hybrid telecom/information services as information services." *Id.* IDT is wrong. For the reasons stated in APCC's comments and reply comments, it is clear that FCC precedent supports the classification of such services as telecommunications services, not information services. Just as when the information services aspect of an offering is "incidental to basic" the offering retains its character as basic, so too where information-access features are incidental to the main purpose of the prepaid card service, which is to enable the card holder to make telephone calls to end users, the service should be classified as a telecommunications service, not an information service.²

¹ As a matter of terminology, it is incorrect to distinguish between, on the one hand, "phone calls" and on the other, "access to stored information." Calls made to a platform to access stored information do not lose their status as "phone calls" merely because they terminate at the platform. IDT elsewhere acknowledges this. *See* IDT 1/6 Ex Parte at 3 (among issues to be addressed are "treatment of *calls* that terminate at the prepaid calling card platform" (emphasis added)). This is an important point in the context of payphone compensation pursuant to Section 276 of the Communications Act. 47 U.S.C. §276(b)(1)(A). *See* Note 4 below.

² Comments of APCC at 11-12; Reply Comments of APCC at 3-4. While it is possible to imagine a situation where a prepaid card is purchased to access a platform used predominantly for information services and only incidentally for

APCC also disagrees with IDT's alternative position that, "[a]t a minimum, if [the] provider can distinguish between phone calls [between end users] and access to stored information, [the] lat[t]er must be classified as information service." IDT 1/18 Ex Parte at 8. Significantly, this alternative, which would draw distinctions between telecommunications service calls and information service calls using the same card, is inconsistent with IDT's own premise that "[p]repaid calling cards are marketed and perceived by consumers as [a] single service." *Id.* Moreover, in the situation described by IDT, the caller not only uses the same prepaid card, but dials the same toll-free number and accesses the same platform to access both the telecommunications functions and the stored information. In fact, the "[c]onsumer may use both services during [the] same call session." *Id.* In these circumstances, to attempt to apply the telecommunications service/information service distinction on a call-by-call basis would create an administrative nightmare for the Commission and would invite further regulatory abuse by prepaid card service providers. For example, if the Commission's access charge rules or universal service fund ("USF") rules continue to exempt information service providers from the fees assessed on carriers, it would be extremely burdensome for service providers, carriers, and the Commission to apply these rules on a call-by-call basis, and to apply different access charge or USF treatment to each *call* made using the same prepaid card, toll-free number, and calling platform, depending on whether the call is classified as a telecommunications or information service.

Call-by-call application of the telecommunications service/information service distinction would wreak particular havoc in the implementation of payphone compensation under Section 276 of the Act.³ Some prepaid card service providers have argued that identifying the party responsible for paying compensation for a payphone call depends on whether a call is classified as a telecommunications service or an

(Footnote Continued)

telecommunications, that issue is not before the Commission and need not be addressed. In the event that the Commission identifies prepaid card services where the information service functions predominate, then in order to preserve the payphone compensation system from chaos, the Commission must clarify its payphone compensation rule to ensure that one carrier is responsible for paying payphone compensation for all types of calls using the platform. Specifically, the Commission must clarify that the prepaid card service provider has the obligation to pay dial-around compensation to PSPs for calls using the information service functions as well as calls using the telecommunications service functions of the platform. See Note 9 below. If the Commission is unwilling to make such a clarification, then APCC believes it would be preferable to classify a prepaid service where information functions predominate entirely as an information service, rather than to apply a call-by-call classification approach, which would bring with it all the major problems discussed in this letter.

³ 47 U.S.C. § 276(b)(1)(A). See also 47 CFR §§ 64.1300-1320. These rules govern the system of FCC-prescribed compensation for completed "dial-around calls." A "dial-around" call is any call placed from a payphone using a toll-free number, including but not limited to calls that utilize a calling card or prepaid card platform.

information service.⁴ If they are correct, and if the Commission adopts a call-by-call approach to service classification, the administrative burden of payphone compensation payments on all parties would increase greatly.

As APCC has explained in its comments and reply comments, in a compensation scheme involving hundreds of carriers, many of whom are motivated to evade their compensation obligations, achieving timely and accurate compensation payments depends on the ability of all parties involved to determine quickly and accurately which entity is liable to pay compensation – and how much – to the payphone service provider (“PSP”).⁵ Currently, dial-around calls are recorded and reported for purposes of payphone compensation based on the toll-free number that is dialed. Thus, carriers and PSPs must be able to rely on the toll-free number associated with a call to determine which carrier is responsible for paying for the call.⁶

⁴ Prepaid card service providers have argued that an “information service provider” does not satisfy the definition of “Completing Carrier.” See Comments of APCC at 4, n. 5. According to this argument, a prepaid card service provider is responsible for paying compensation directly only for calls using a “telecommunications service,” and not for calls using an “information service.” APCC does not agree with this position, but the issue has not been definitively addressed by the Commission. The discussion in the text that follows assumes that these providers are correct, and that a prepaid card service provider cannot be liable to pay compensation as a Completing Carrier for calls classified as information services.

While there may be a question as to who pays, there can be no dispute that calls placed from payphones to access information at a prepaid card platform *are* subject to payphone compensation by some entity – if not by the prepaid card service provider itself, then by the carrier delivering the call to the prepaid card service provider. Section 276 requires that payphone service providers be fairly compensated for every “completed . . . call” originating from a payphone. A “completed call” is a call that is answered by the called party. *Pay Telephone Compensation and Reclassification Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, 20573 ¶ 63 (1996) (“*First Payphone Order*”). In the case of calls placed to a platform to check account balance or access stored information, the intended “called party” is the platform itself, where a transaction takes place (e.g., the caller replenishes the caller’s card, or checks his/her balance, or listens to a joke or gets a sports score). Thus, regardless of the jurisdictional classification of these calls as interstate or intrastate, or their regulatory classification as telecommunications or information service, such communications are clearly completed “calls” subject to payphone compensation under Section 276.

⁵ Comments of APCC at 14 (filed April 15, 2005); Reply Comments of APCC at 16 (filed May 16, 2005). See 47 CFR §§ 64.1300.

⁶ Carriers are classified as either “Completing Carriers” or “Intermediate Carriers,” with the former being responsible for paying dial-around compensation. See 47 CFR §§ 64.1300, 64.1310(b). Under the Commission’s dial-around rules, Completing Carriers are required to give PSPs reports detailing calls for which the carrier is paying. *Id.* § 64.1310(a)(4). Intermediate Carriers are required to give PSPs reports showing calls

Call-by-call application of the telecommunications service/information service distinction to a single prepaid card service using a single toll-free number would create multiple problems for payphone compensation. First, a call-by-call classification approach would provide many more opportunities for carriers to evade their compensation obligations. Unless the criteria for classifying every call were crystal clear – a highly unlikely prospect given the line drawing that is frequently necessary to distinguish an information service from a telecommunications service – then each carrier would tend to classify a call in the manner most favorable to it – *i.e.*, in the manner that enables it to argue that it is not the carrier responsible for paying compensation for the call. As a result, many more calls would “fall through the cracks” and go uncompensated.

Second, even if carriers were not motivated to avoid payment, there would be no means for carriers to efficiently report and pay for calls. In order to determine how many calls it is liable to pay for, the carrier transporting a call to a prepaid card platform would need to know which calls are a telecommunications calls and which are information services calls.⁷ The carrier delivering the call to the platform would not be able to make this determination until the prepaid card service provider told the carrier which category each call fell into – a process that, based on experience, would take several months. This would lead to precisely the type of “true-up” and time-lag problems that the Commission sought to avoid when it revised the payphone compensation rule in October 2003.⁸

(Footnote Continued)

that the carrier sent on to other carriers for completion. *Id.* § 64.1310(c). All calls are identified by 800 number.

⁷ If the call is classified as a telecommunications service call, then the prepaid service provider would be the Completing Carrier required to pay for the call and the carrier delivering the call would be required to report the call as an Intermediate Carrier. If the call is classified as an information service call, then the carrier delivering the call would be the Completing Carrier and would be required to make the compensation payment to the PSP. Again, this outcome is based on the assumption that, under the Commission’s compensation rule, a prepaid card service provider cannot be liable to pay compensation as the “Completing Carrier” for calls classified as nonregulated information services.

⁸ *Pay Telephone Compensation and Reclassification Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975 (2003) (“*Tollgate Order*”). Under the rule in effect in 2003, a “true-up” problem arose because the Act only requires compensation for “completed” calls. 47 U.S.C. § 276(b)(1)(A). The rule in force at the time required the first Intermediate Carrier to make the compensation payment for calls completed by a different carrier, such as a prepaid card service provider. The Commission found that the rule “resulted in administrative inefficiencies” because it required an Intermediate Carrier to make payments for completed calls without having first-hand knowledge of which calls were completed. *Id.* ¶ 30. Thus, when the Intermediate Carrier subsequently received call completion data from the switch-based reseller (“SBR”) to whom it delivered the call, the Intermediate Carrier “was compelled

Third, call-by-call classification would disrupt the reporting scheme on which PSPs rely to verify that dial-around calls have been correctly reported and paid for, and to identify carriers that try to evade their payment obligations. As explained in Note 6 above, Intermediate Carriers are required to give PSPs reports identifying all the dial-around calls that the carrier sent on to other carriers for possible completion. *Id.* § 64.1310(c). With a call-by-call approach to classification, the carrier delivering a call to a prepaid card platform would need to determine whether a call is classified as telecommunications service or information service before determining whether it has an obligation to report the call as an Intermediate Carrier. *See* Note 7 above. Inevitably, carriers would file inaccurate reports or would defer reporting until all calls are correctly classified. Intermediate Carrier reports, which are critical to PSPs' ability to collect compensation, would be far less reliable and PSPs' efforts to collect payment would be crippled.

In summary, the Commission should not try to "slice and dice" the regulatory treatment of prepaid card services by applying disparate regulatory classifications to calls placed using the same calling card, platform, and toll-free number. Where telecommunications is clearly the dominant use of the service, the entire service should be classified as telecommunications service.⁹

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to engage in a lengthy and complicated 'true-up' process to recover the overpayments from the SBR that the [Intermediate Carrier] had made to the PSPs." *Id.*

In addition to the "true-up" problem, placing payment responsibility for information service calls on the carrier delivering the call to the platform would place the payment burden on a carrier who is not the primary economic beneficiary of the call – again violating a fundamental principle of the Commission's *Tollgate Order*. *Id.* ¶¶ 28-34 (reaffirming that compensation responsibility should be placed on the "primary economic beneficiary" of a dial-around call and identifying the SBR as the "primary economic beneficiary"). As SBRs, prepaid card service providers are the "primary economic beneficiaries" liable to pay compensation for telecommunications service calls under the current rule. When a prepaid card is used to pay for an information service, the prepaid card service provider is the "primary economic beneficiary" the same as it is when the card is used to pay for a telecommunications service.

⁹ In the event that, despite these major problems, the Commission chooses to adopt a call-by-call classification approach, the Commission must attempt to minimize the adverse impact of such a ruling on payphone compensation. If the Commission adopts a call-by-call approach, therefore, it must clarify that, for purposes of payphone compensation, a prepaid card service provider is liable to pay compensation as a "Completing Carrier" for *all* the completed payphone calls that utilize its platform, *including* calls that are classified as information services. *See* Comments of APCC at 14-16; Reply Comments of APCC at 15-17.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich". The signature is fluid and cursive, with the first name "Robert" and last name "Aldrich" clearly distinguishable.

Albert H. Kramer
Robert F. Aldrich

cc: Michelle Carey
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